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Letter dated 5 August 2016 from the Secretary-General addressed to the President of the Security Council

I have the honour to transmit to you the enclosed letter dated 29 July 2016 from Judge Carmel Agius, President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) (see annex).

In his letter, Judge Agius raised a matter concerning the composition of the Appeals Chamber of ICTY. Specifically, Judge Agius notes that there are seven permanent judges remaining at ICTY, four of whom are assigned to the Appeals Chamber and three to the Mladić trial (of whom one is also assigned to the Prlić appeal). Therefore, in the event of an interlocutory appeal from the Mladić trial, it would not be possible to compose an appellate bench of five judges as required by article 12, paragraph 3, of the statute of ICTY because the judges assigned to the Mladić trial would be conflicted.

In anticipation of this problem, Judge Agius proposes that the Security Council consider authorizing the ad hoc and temporary assignment of Judge Burton Hall (Bahamas) to the Appeals Chamber of ICTY for the purposes of any interlocutory appeals from the Mladić trial. Judge Hall was a permanent judge of ICTY until the recent termination of the proceedings in the Hadžić trial. He is the Presiding Judge in the Stanišić and Simatović retrial before the International Residual Mechanism for Criminal Tribunals (the Mechanism) and as such is based in The Hague. Judge Agius states that Judge Hall would serve in ICTY and the Mechanism simultaneously, and that he would be remunerated on a pro rata basis for any work that he would perform on the interlocutory appeals from the Mladić trial. Judge Agius has consulted other ICTY judges and the President of the Mechanism on his proposal.

In this regard, I should note that a judge of ICTY may also hold the position of judge of the Mechanism, pursuant to article 7 of the Transitional Arrangements set out in annex 2 to Security Council resolution 1966 (2010).

I also recall that in the latest completion strategy report, which was submitted to the Security Council in May 2016, ICTY projected that the Mladić trial will be completed by the end of 2017. Further, according to its May 2016 progress report, the Mechanism expects that the initial projections for the commencement and completion of the Stanišić and Simatović retrial will be presented in the next progress report of the Mechanism to the Security Council.

I should be grateful if you would bring the present letter and its annex to the attention of the members of the Security Council.

(*Signed*) **BAN** Ki-moon

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Annex

I have the honour to address you in relation to a matter concerning the composition of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

You will recall that article 12, paragraph 3, of the statute of ICTY provides that "[s]even of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members". However, after the completion of the Stanišić & Župljanin appeal on 30 June 2016, and the recent termination of the Hadžić trial on 22 July 2016, ICTY is left with seven permanent judges. Four of the judges are assigned to the Appeals Chamber and three to the Mladić trial (one of whom is also assigned to the Prlić et al. appeal).

In the event of an interlocutory appeal in the Mladić case, the judges assigned to the Mladić trial would be conflicted and could not be assigned to the appeal. Under the current circumstances it would therefore not be possible to compose an Appeals Chamber bench of five judges as required by article 12, paragraph 3, of the statute of ICTY. Further, under the existing statute, I see no option that would enable ICTY to assign an Appeals Chamber of fewer than five judges to any interlocutory appeal from the Mladić case. In any event, I would not consider the assignment of fewer than five judges to be an advisable option.

In order to resolve this pressing issue, I would propose that the Security Council consider authorizing the ad hoc and temporary assignment of Judge Burton Hall (Bahamas), who is both a former permanent judge of ICTY (following the recent termination of the Hadžić case) and current judge of the International Residual Mechanism for Criminal Tribunals (Mechanism), to the Appeals Chamber of ICTY for the purposes of any interlocutory appeals from the Mladić trial. As the Presiding Judge in the Stanišić & Simatović retrial before the Mechanism, Judge Hall is already based in The Hague. Judge Hall would serve in ICTY and the Mechanism simultaneously and ICTY would remunerate him on a pro-rata basis for any work performed as a member of the Appeals Chamber on the interlocutory appeals. I emphasize that this proposal in no manner envisages Judge Hall's assignment as an extension to his recently expired mandate.

In my view, this is the simplest and most cost-neutral way to resolve the matter. While the potential problem regarding the Mladić case has not materialized yet, it is looming large on the horizon. Indeed, the accused has recently made several requests for leave to appeal that are yet to be disposed of by the Mladić Trial Chamber. Consequently, it is likely that interlocutory appeals will be filed before the Appeals Chamber in the near future, and it is crucial that any such appeals be dealt with promptly so as not to delay the Mladić trial or jeopardize its timely completion or the rights of the accused in any way. It is therefore my duty to raise this matter, which has emerged earlier than could be anticipated following the death of Mr. Hadžić, and request that it be brought to the attention of the Security Council for urgent consideration.

Finally, I would add that I have consulted the Bureau of ICTY on this proposal, in accordance with Rules 23(B) and 23(D) of the ICTY rules of procedure and evidence, and have also discussed the matter comprehensively with all judges at the recent plenary session on 6 July 2016. In addition, I have consulted the President of the Mechanism regarding this proposed arrangement.

I would be grateful if you would bring the present letter to the attention of the Security Council at your earliest convenience.

(*Signed*) Judge Carmel **Agius**
President